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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

**JOSE ANTONIO HERNANDEZ,**

Petitioner,

**v.**

**JAMES E. TILTON, Director of Corrections,**

Respondent.

No. C 07-3778 MMC (PR)

**ANSWER TO ORDER TO  
SHOW CAUSE**

Respondent, James E. Tilton, Director of the California Department of Corrections,  
provides this Answer to the Order to Show Cause.

**I.  
CUSTODY**

Petitioner is lawfully confined in the custody of the California Department of Corrections  
and Rehabilitation, pursuant to a judgment imposed by the Monterey County Superior Court on  
October 27, 2005. A jury found petitioner guilty of attempted murder of a public official with use  
of a firearm, Cal. Penal Code §§ 217.1(b), 12022.53(b), aggravated assault on a peace officer with  
use of a firearm, Cal. Penal Code §§ 245(d)(1), 12022.53(b), exhibiting a deadly weapon to resist

1 arrest, Cal. Penal Code § 417.8, and being a felon in the possession of a firearm for the benefit of  
 2 a criminal street gang, Cal. Penal Code §§ 12021(a)(1), 186.22(b)(1). Petitioner admitted prior  
 3 conviction allegations of one prior strike, Cal. Penal Code § 1170.12(c)(1), and three prior prison  
 4 term commitments, Cal. Penal Code § 667.5(b). The trial court sentenced petitioner to state prison  
 5 for 30 years to life and a consecutive 13-year term. *See* Respondent's Exhibit A (hereinafter "CT")  
 6 at 139-41, 151-52, 159, 161-66, 247-49, 254-55.

## 7 **II.** 8 **STATE PROCEDURAL HISTORY**

9 By amended information the Monterey County District Attorney charged petitioner with  
 10 one count of attempted, deliberate, premeditated murder, Cal. Penal Code §§ 664, 187(a), with use  
 11 of a firearm, Cal. Penal Code § 12022.53(b); one count of attempted murder of a public official to  
 12 retaliate for or prevent the performance of that official's duties, Cal. Penal Code § 217.1(b), with  
 13 use of a firearm, Cal. Penal Code § 12022.53(b); one count of aggravated assault on a peace officer,  
 14 Cal. Penal Code § 245(d)(1), with use of a firearm, Cal. Penal Code § 12022.53(b); one count of  
 15 exhibiting a deadly weapon to resist arrest, Cal. Penal Code § 417.8; two counts of being a felon  
 16 in the possession of a firearm, Cal. Penal Code § 12021(a)(1), for the benefit of a criminal street  
 17 gang, Cal. Penal Code § 186.22(b)(1); two counts of street terrorism, Cal. Penal Code § 186.22(a);  
 18 and two counts of second-degree robbery, Cal. Penal Code § 211, with use of a firearm, Cal. Penal  
 19 Code § 12022.53(b), and for the benefit of a criminal street gang, Cal. Penal Code § 186.22(b)(1).  
 20 *See* CT at 139-41. The information alleged one prior strike, Cal. Penal Code § 1170.12(c)(1), and  
 21 three prior prison term commitments, Cal. Penal Code § 667.5(b). CT at 139-41.

22 On August 23, 2005, trial by jury commenced. CT at 129. On August 29, 2005, petitioner  
 23 admitted the truth of the alleged priors. CT at 151-52. On August 30, 2005, the jury found  
 24 petitioner guilty of one count of attempted murder with use of a firearm, one count of attempted  
 25 murder of a public official with use of a firearm, one count of aggravated assault on a peace officer  
 26 with use of a firearm, one count of exhibiting a deadly weapon to resist arrest, and one count of  
 27 being a felon in the possession of a firearm. CT at 159, 161-66. The jury found the attempted  
 28 murder was not premeditated and acquitted petitioner on the remaining counts. CT at 159, 167-73.

On October 27, 2005, the trial court imposed a prison sentence of 30 years to life, plus 13 years. CT at 247-49, 254-55.

On January 29, 2007, the California Court of Appeal found the count one attempted murder was a necessarily included offense of count two and vacated count one. As modified, the judgment was otherwise affirmed. *See* Respondent's Exhibit B.

On April 11, 2007, the California Supreme Court denied the petition for review. *See* Respondent's Exhibit C.

### III. FEDERAL PROCEDURAL HISTORY

On July 23, 2007, petitioner filed the instant petition for writ of habeas corpus under 28 U.S.C. § 2254. On November 15, 2007, the Court issued the Order to Show Cause. *See* Order to Show Cause.

### IV. CLAIMS FOR RELIEF

Respondent denies each of petitioner's claims, denies that any of petitioner's claims state a basis for federal habeas corpus relief, and affirmatively alleges that petitioner's convictions did not result from a violation of any federal constitutional right. Respondent incorporates by reference the Points and Authorities filed in support of the Answer. Respondent specifically responds to the sole claim as follows.

#### **Insufficient Evidence In Support Of Count Two**

Petitioner has failed to show that the state courts' disposition was "contrary to, or involved an unreasonable application" of *Jackson v. Virginia*, 443 U.S. 307 (1979), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(1), (2).

### V. EXHAUSTION

Petitioner exhausted his state remedies with respect to the federal claim found cognizable in the instant petition. *Rose v. Lundy*, 455 U.S. 509 (1982); *see* Respondent's Exhibit C.

1 **VI.**  
2 **AVAILABLE TRANSCRIPTS AND RECORD**

3 Respondent has lodged with the Clerk of the Court copies of the relevant state record:  
4 Exhibit A (Clerk's Transcript); Exhibit B (Unpublished Court of Appeal Opinion); Exhibit C  
5 (Petition for Review and Order Denying Petition for Review); Exhibit D (Reporter's Transcript of  
6 Trial).

7 **VII.**  
8 **EXPRESS AND IMPLIED FACTUAL FINDINGS**

9 Respondent alleges that petitioner received a full and fair hearing on all of his claims in  
10 the state courts, and that all express and implied factual findings by the state courts are entitled to  
11 a presumption of correctness. 28 U.S.C. § 2254(d), (e)(1). Respondent denies that any claim made  
12 by petitioner requires an evidentiary hearing by this Court. 28 U.S.C. § 2254(e)(2).

13 **VIII.**  
14 **GENERAL DENIAL**

15 Respondent denies each and every factual or procedural allegation in the petition affording  
16 a basis for relief that has not been expressly admitted in the Answer. Respondent incorporates by  
17 reference any statements of fact material to the issues herein which are contained in the  
18 accompanying memorandum of points and authorities or in the exhibits filed with this Court, to the  
19 extent not inconsistent with the respondent's factual allegations herein.

**CONCLUSION**

Accordingly, respondent respectfully requests that the Court deny the petition for writ of habeas corpus.

Dated: February 11, 2008

Respectfully submitted,

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